No. 11067

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES MILLER, JAKE AND MARJORIE CROPLEY, FRANK AND LILLY EDWARDS, WILLIE PETERS, JIMMIE JACK, DAVID WILLARD, HERBERT MERCER, SUSIE MICHAELSON, MARY JOHNSON, LILLY YARQUAN, EDWARD N. AND CECILIA KUNZ, JENNIE KLANEY, JESSIE WILSON, JACOB YARKON, BESSIE VISAYA, JIMMIE K. HANSON, MARY GEORGE, PAUL RUDOLPH, WILLIAM KUNZ AND LILLY HOOLIS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF ALASKA DIVISION NUMBER ONE HONORABLE GEORGE F. ALEXANDER, Judge

Brief of Appellants

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JURISDICTION OF THE DISTRICT AND CIRCUIT COURTS

This case comes on appeal from final judgment of the District Court of the Territory of Alaska, Division Number One, at Juneau, for appellee and against appellants' Answer and Claim, rendered March 20, 1945 (R. 19).

Appellee's petitions were filed under the authority of the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518), and March 27, 1942 (Public Law 507, 77th Congress), which Acts authorize the acquisition of real and personal property for military or other war purposes, and the Act of Congress approved April 28, 1942 (Public Law 528, 77th Congress), which appropriated funds for such purposes.

The jurisdiction of the District Court is therefore within the general jurisdiction provided for in Sec. 101, Title 48, U. S. C., which follows:

> There is established a District Court for the Territory of Alaska, with the jurisdiction of district courts of the United States, and with general jurisdiction in civil . . . . equity . . . . cases . . . .

The jurisdiction of the Circuit Court of Appeals depends on Sec. 225, Title 28, U. S. C., which follows:

> The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal final decisions of the District Court for Alaska or any division thereof, in all cases civil and criminal,

wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved . . . .

SUMMARY OF THE ALLEGATIONS OF THIRD AMENDED PETITION

Paragraph Second mentions the Juneau Subport of Embarkation, to consist of wharfage facilities, and sets forth the public use of the United States.

Paragraph Third gives the perimeter description embracing about 10.95 acres.

Paragraph Fourth states that the interest desired to be condemned is the whole interest.

Paragraph Seventh alleges that the land is tideland, of which the title is already in the appellee.

SUMMARY OF THE ALLEGATIONS OF THE ANSWER AND CLAIM

On July 27, 1944, twenty-four Indians denied Paragraph Seventh of appellee's Third Amended Petition (R. 10).

At the same time they set forth an affirmative defense and claim (R. 11) of aboriginal use and occupation, possession and right to possession to an area about 20 acres in extent, which included the area of the Subport's 10 acres. An allegation of damage arising from appellee's taking on September 19, 1942 in the sum of $80,000 plus interest is made.

DEMURRER

Appellee demurred that the Answer and Claim stated insufficient facts to constitute any interest entitling appellant to compensation.

The District Court wrote an opinion sustaining the demurrer and on March 16th, 1945 (R. 17), entered its Order so sustaining. On March 20, 1945, the Court entered final judgment against appellants that they have no right, estate or compensable interest in said land as against the plaintiff (R. 22).

ASSIGNMENT OF ERRORS

Appellants assign as error the points made by the Court in its Opinion sustaining the demurrer.

"Defendants cannot acquire title to tide-lands by adverse possession in any manner against plaintiff".

Since the writer of this brief, William L. Paul Jr., a young lawyer of Alaska Indian descent, first wrote on the subject of Alaska Indian Aboriginal Claims, the subject has been developed considerably by attorneys for the Department of the Interior, in the Hearings of the Secretary of the Interior on Aboriginal Claims of the Klawock, Kake, and Hydaburg Tribes, and in the cases No. 11103 and 10611 with which this one has been consolidated. Such development has had the effect considerably of narrowing the legal points that are considered material.

The fact that tidelands are involved is immaterial. In No. 10611, some discussion appears on *Damon v. Hawaii*, 194 U. S. 154 (1904), and *Carter v. Hawaii*, 200 U. S. 255 (1906), and such discussion need not be repeated here. Sufficient to quote:

> The right claimed is a right within certain metes and bounds to set apart one species of fish to the owner's sole use . . . . there is no more theoretical difficulty in regarding it as property and a vested right then there is in regarding an ordinary easement or profit a prendre as such.

There has been no adverse holding by appellants against the United States until the commencement of this action.

The fifth paragraph of appellant's Claim (R. 11) states that claimants ever since 1867 have been, and now are the aboriginal users and occupants of, and in the exclusive possession of, and entitled to the exclusive possession of the area in controversy.

The lower court must have conceived, not of a factual adversity, but rather of a legal adversity; that is to say, the appellee got title sometime in some manner, and appellants are now squatters.

But appellants have never yet had such acquisition of title by appellee clearly and unequivocally set forth. Some reference is usually made to the Treaty of Cession of 1867 from Russia, but this by its terms affects only sovereignty and public lands.

And at no time later has Congress acted to take

appellants' lands from them. Every statute contains a clause saving private property rights, for instance, the Act of May 17, 1884, 23 Stat. 24, 26:

> The Indians or other persons in the Territory of Alaska shall not be disturbed in the possession of any lands actually in their use or occupation, or now claimed by them, but the terms under which such person may acquire title to land are reserved for future legislation by Congress.

Thus it appears that appellee in a proprietary sense (other than the trusteeship of a guardian over its ward, not here material) has had no title to the area involved of which appellee could attempt to divest them.

But perhaps the lower court simply assumed that appellants could have no property until recognized by appellee. No. 10611 contains at page 18 et seq. a discussion of recognition which it is not necessary to repeat here beyond reference to *United States, as Guardian of the Hualpai Indians of Arizona v. Santa Fe Pacific R.R. Co.*, 314 U. S. 339, 345:

> Nor is it true . . . . that a tribal claim to any particular lands must be based upon treaty, statute or other formal governmental action. As stated in the *Cramer* Case, "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive" 216 U. S. at 220.

Since there is no Congressional action affirmatively taking appellants' specific property, it cannot now be taken without just compensation for public

use by the Secretary of War or the U. S. Attorney General.

Choteau v. Molony, 16 How. 203, 239, 57 U. S. 216, 255

It is indeed entirely presumptuous for the U. S. Attorney to enter Court under a condemnation Act requiring payment of compensation for the taking of property, while at the same time alleging (R. 6) and arguing that appellants loss of property is not compensable because they are Indians. Congress has said in the condemnation Act that property must be paid for, but the U. S. Attorney at Juneau in effect says that Congress did not mean "property" but only Italian property, Jap property, German property, and the property of the White and Negro people of the United States.

To our way of thinking, we have seen no more unjust application of the Constitution and Laws of the United States than here attempted by counsel, and the lower Court should be reversed.

Respectfully submitted
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By

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Of Counsel